90-1988 (1)

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN W. GARD
Counsel of Record
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2263

ORVILLE E. STIFEL II
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-4122

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether law enforcement officials who exercise no lawful discretion in conducting a warrantless search and seizure, but instead violate a legally binding ministerial duty, are entitled to qualified immunity in an action brought pursuant to 42 U.S.C. §1983?

2. Whether qualified immunity entitles law enforcement officials to summary judgment when there is a material issue of fact whether they actually knew, or reasonably should have known, that they had had no probable cause to conduct a warrantless search and seizure?

3. Whether law enforcement officials who conduct a warrantless search and seizure with no lawful authority, under no exigent circumstances and in direct violation of an injunction are entitled to qualified immunity in an action filed pursuant to 42 U.S.C. §1983?

4. Whether Pembauer v. City of Cincinnati, 475 U.S. 469 (1986), establishes that the unconstitutional conduct of the final and ultimate policymaker itself constitutes municipal policy sufficient to impose liability on the governmental entity under 42 U.S.C. §1983?

LIST OF PARTIES

Petitioner Antoinette Russo, a law-abiding grandmother with no previous arrests or liquor violation citations, is the owner of the Stagecoach Restaurant and Lounge, a small neighborhood establishment located in rural Beaver Township, Ohio.

Petitioner Mildred Maloney, an elderly diabetic with no previous arrests, was employed as a cook at the Stagecoach Restaurant and Lounge.

Respondent Carl Massullo is the Acting Chief of Police of Respondent Beaver Township. Respondent Massullo was the "final policymaker" for the Respondent Township in regards to day-to-day law enenforcement matters. On April 16, 1987

Respondent Massullo participated in the planning and execution of an armed raid on the Stagecoach Restaurant & Lounge for the purpose of seizing two video games lawfully maintained on the premises. Respondents Frost, Martin and Frost, accompanied by another 5 - 8 law enforcement officials (Respondents John Doe 1-7), also participated in this video game raid.

Respondent Scott Pohlman, an agent employed by the Ohio Department of Liquor Control, participated in the planning and execution of the armed "raid" and video game seizure at the Stagecoach Restaurant & Lounge and thereafter instituted criminal proceedings against Petitioners which were later dismissed on the ground that there was no evidence to support them.

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IN THE
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Respondents.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Antoinette Russo and Mildred Maloney respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit filed on March 5, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Case Nos. 90-3240 and 90-3241, is unreported and is reproduced here as Appendix A.

The opinion of the United States District Court for the Northern District of Ohio, Case Nos. C88-0928Y and C88-0929Y, is unreported and is reproduced here as Appendix B.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion and judgment on March 5, 1991. This petition was timely filed within ninety days of that date.

The jurisdiction of this Court to re-

view the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §1983 which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

This case also involves the fourth amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Finally, this case involves §1 of the fourteenth amendment to the United States Constitution, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1985 Petitioner Antoinette Russo assumed ownership of the Stagecoach Restaurant & Lounge as a result of her divorce from her abusive ex-husband. She agreed to have two video draw poker games installed after being shown an accurate copy of an injunction which absolutely prohibited the Respondents, and each of them, from "seizing, impounding or confiscating" such video games in Mahoning County, Ohio. Garono v. State, Case No. 85 CV 315 (Mahoning Comm. Pleas 1985), aff'd, 85 CA 44 (Mahoning App. 1985), aff'd, 37 Ohio St.3d 171 (1988). At no time thereafter did any law enforcement official, includ- Respondents, advise Petitioner Russo that they would not abide by the injunction or that they had any reason to believe that the games were unlawful.

The Garono injunction was issued in response to a long history of harassment of the possessors of video games in Mahoning County by the Respondents. In 1982 the Ohio Department of Liquor Control conceded that the mere possession of video draw poker games was not violative of Ohio law or the regulations of the Ohio Department of Liquor Control. Mills-Jennings of Ohio, Inc. v. Ohio Department of Liquor Control, 70 Ohio St.2d 95 (1982). Rather than cease the seizure of the video games, Respondent Pohlman and other liquor agents merely altered their enforcement methods:

> [T]he agents manifested a belief that the law . . . prevented them from seizing the draw poker machines "on sight", but that the machine could be seized if they obtained a payoff on that machine. With this in mind, the agents frankly admitted that they set out to obtain payoffs. . . . After taking due note of the demeanor of each of the

> State's witnesses, the evasive manner in which they answered questions, the inconsistencies in their testimonies, and their frank admissions that the sole purpose of their "undercover investigations" was to justify a subsequent seizure of the machines, the Court concludes that the testimony offered by the state amounts to nothing more than exaggerations and distortions. . . .

State v. Skalada, Case No. 84-1976 (Youngstown Muni. Ct. 1984), at p. 1 n.1. (Emphasis added).

When the owner of the video games successfully secured an injunction in 1985 prohibiting Respondents, and each of them, from "seizing, impounding or confiscating" the machines, Respondents stipulated that seizure of the video games was wholly unnecessary for any proper law enforcement purpose. Garono v. State, 37 Ohio St.3d at 172.

On February 2, 1987, Respondent Massullo wrote a letter to the Department of Liquor Control, stating, admittedly with no basis in fact, that there was illegal gambling occurring at the Stagecoach Restaurant & Lounge. At this time, Respondent Massullo knew that recent undercover investigations by officers of his own police department had discovered no illegal activities at the Stagecoach.

On the basis of this letter Respondent Pohlman, who alone had seized as many as 500 video games despite the Ohio Supreme Court's decision in Mills-Jennings, supra, and the Garono injunction, began an undercover investigation at the Stagecoach Restaurant & Lounge on March 5, 1987. The investigation concluded on April 4, 1987. Respondent claimed to have received a pay-

off for playing the video games at the Stagecoach, but this testimony was rebutted by his own contemporaneous handwritten records which demonstrated that he neither played any video game nor received a payoff. Instead, his own records reveal that he purchased, and presumably consumed, an average of $18.00 worth of liquor daily.

Thereafter Respondents Pohlman, Massullo, Frost, Martin and Frost met and agreed to conduct an armed raid on the Stagecoach Restaurant & Lounge expressly for the purpose of seizing the two video games in violation of the Garono injunction.

On the evening of April 16, 1987 Respondents, acting without a warrant or any other lawful authority, conducted a massive armed raid on the Stagecoach Restaur-

ant & Lounge. At approximately 9:30 p.m. Respondents, accompanied by another 5 - 8 armed officers, entered the Stagecoach, pointed shotguns at everyone inside and demanded that Petitioners and all others raise their hands above their heads. Respondents held the Petitioners and the customers hostage on the premises for two (2) hours, searched them each one or more times, twice emptied the contents of Petitioner Russo's purse, refused to allow them to use the restroom without a police escort, required at least one customer to partially disrobe, beat another customer in the parking lot, forcibly ejected customers from the premises without allowing them to pay for food and beverage which they had consumed and refused to permit other customers to enter the premises. During this two hour siege Respondents re-

peatedly stated that no warrant was necessary to authorize their conduct.

Respondent Massullo, the ultimate and final policymaker for Respondent Beaver Township, was present during the raid and commended his officers for their performance. Respondent Pohlman later admitted that the Respondents were "all kind of there together", "there were no clear bosses" and "it [was] more of a joint thing."

At the conclusion of this armed raid Respondents seized the two video games in direct violation of the Garono injunction. Criminal charges against Petitioners Russo and Maloney for gambling and operating a gambling house were later dismissed on the ground that there was no evidence to support them. Respondent Pohlman testified

in the criminal proceedings and, if his testimony that he received a payoff had been believed that would have constituted some evidence to support his allegations. Thus, the court necessarily discredited the testimony of Respondent Pohlman. No other arrests and no evidence of any illegal activity was discovered by Respondents as a result of the April 17, 1987 raid.

Petitioners Russo and Maloney each filed a Complaint in the District Court on April 14, 1988, alleging causes of action under 42 U.S.C.§1983 for violations of the fourth and fourteenth amendments to the United States Constitution. Each Petitioner filed an Amended Complaint on October 17, 1988. The District Court consolidated the cases because they arose out of

the same incident.

Following full discovery, the District Court granted summary judgment to all Respondents on February 16, 1990. The District Court stated that "the defendants should not be commended for ignoring an injunction against them" but nevertheless held that the disputed statements of Respondent Pohlman that he had received a payoff was sufficient to establish probable cause for the seizure and arrests and that the actions of the Respondents were reasonable as a matter of law under the circumstances as an administrative inspection of a liquor establishment. Finally, the District Court held that there was no established municipal policy or custom by Respondent Beaver Township upon which to base liability.

Respondents each filed timely notices of appeal in the United States Court of Appeals for the Sixth Circuit, which consolidated the cases.

The Court of Appeals rendered its opinion and judgment on March 5, 1991. Ignoring the warrant requirement of the fourth amendment, the Court of Appeals held that the "test for the entry itself and all subsequent conduct is whether these are reasonable." The Sixth Circuit Court of Appeals then refused to hold that Respondents' knowing violation of the injunction, absolutely prohibiting the seizure of the video games, rendered their actions per se unreasonable or stripped them of qualified immunity.

Finding that the seizure and arrests were not justified, statutorily or consti-

tutionally, as an administrative inspection and identifying no exigent circumstances, the Court of Appeals nevertheless partially affirmed the grant of summary judgment for Respondents Massullo, Frost, Martin and Frost on the sole ground that they were relying on the statement of Respondent Pohlman that he had received a payoff more than 12 days earlier. The grant of summary judgment for Respondent Pohlman was reversed, however, on the ground that he was entitled to no qualified immunity if a jury found that his statement regarding the alleged payoff was a knowing or reckless falsehood.

The Court of Appeals also held that the District Court's grant of summary judgment to Respondents Pohlman, Massullo, Frost, Martin and Frost, based on quali-

fied immunity, was improper regarding the the reasonableness of the scope and manner of the search.

Finally, the Court of Appeals affirmed the grant of summary judgment for Respondent Beaver Township. Finding that there was sufficient evidence from which a jury could conclude that Respondent Massullo was the final and ultimate policymaker for Respondent Beaver Township, the Court of Appeals held that, in addition to the unconstitutional conduct of the final municipal policymaker, the Petitioners had failed to prove some additional "municipal policies and customs" which caused the constitutional injuries to Petitioners.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. LAW ENFORCEMENT OFFICIALS WHO EXERCISE NO LAWFUL DISCRETION IN CONDUCTING A WARRANTLESS SEARCH AND SEIZURE, BUT INSTEAD VIOLATE A LEGALLY BINDING MINISTERIAL DUTY, ARE ENTITLED TO NO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established the general standard governing the qualified immunity available to government officials in an action brought under 42 U.S.C. §1983:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Thus Harlow emphasized the fundamental importance of the distinction between discretionary and ministerial functions of government officials for purposes of qualified immunity: "Immunity generally is available only to officials performing discretionary functions." Id. at 816.

Perhaps because this language was not essential to the holding in Harlow, a significant conflict has developed between the federal circuit courts of appeal as to whether qualified immunity is available to a government official who is exercising no discretionary function, but rather acting in violation of a ministerial duty. Thus, in the instant case the Sixth Circuit joined the Fourth, Seventh and Eighth Circuits in granting a qualified immunity defense to a government official who was ex-

ercising no lawful discretion, but instead violating a clear ministerial duty. See, e.g., Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980); Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987).

In contrast, the First, Third, Fifth, Ninth and Eleventh Circuits have endorsed and applied the distinction, finding that a government official is entitled to qualified immunity only if engaged in a discretionary function rather than the violation of a ministerial duty. See, e.g., Conte v. Collins, 898 F.2d 284 (1st Cir. 1990); People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139 (3d Cir. 1984); Gagne v. City of Galveston, 805 F.2d 558 (5th Cir. 1986); F.E.

Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989); Harrell v. United States, 875 F.2d 828 (11th Cir. 1989). See also Burris v. Mahaney, 716 F.Supp. 1051, 1064 (M.D. Tenn. 1989); Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, 708 F.Supp. 1477, 1481 (W.D. Va. 1989); Woods v. White, 689 F.Supp. 874 (W.D. Wisc. 1988); Breault v. Chairman of Board of Fire Commissioners, 401 Mass. 26, 513 N.E.2d 1277 (1987), cert. denied sub. nom. Forastiere v. Breault, 108 S.Ct. 1078 (1988).

The public interest demands that this conflict between the federal courts of appeal be resolved by an explicit holding that a government official who violates a clear ministerial duty forfeits any claim to qualified immunity. As a matter of

both history and public policy, "the exercise of discretionary judgment by the state official is the cornerstone to the defense of qualified immunity." Avery v. Powell, 695 F. Supp. 632, 642 (D. N.H. 1988).

On its face 42 U.S.C. §1983 contains no immunities whatsoever for government officials who violate the constitutional rights of citizens. The judicial creation of official immunities in §1983 actions is justified by the fact that the drafters of the statute intended that it be interpreted consistently with the immunities recognized by the common law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

The common law at the time of the

drafting of 42 U.S.C. §1983 granted immunity from civil liability only to government officials whose conduct involved some exercise of discretion. See, e.g., Amy v. The Supervisors, 78 U.S. (11 Wall.) 136, 138 (1870); Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845). Thus, fidelity to the intent of the drafters of 42 U.S.C. §1983 requires that a government official whose conduct is violative of a clear ministerial duty be afforded no qualified immunity.

Public policy also requires that a government official who violates a ministerial duty not be permitted to assert a qualified immunity defense in a §1983 action. The doctrine of qualified immunity represents a carefully crafted balance between "the importance of a damages remedy

to protect the rights of citizens . . . [and] 'the need to protect officials who are required to exercise their discretion . . . .'" Harlow v. Fitzgerald, 457 U.S. at 807, quoting Butz v. Economou, 438 U.S. 478, 506 (1978).

A failure to resolve the conflict between the circuit courts of appeal by explicitly limiting the availability of the qualified immunity defense to government officials who are exercising a discretionary function would uncouple the doctrine of qualified immunity from its underlying rationale:

> The basic idea behind good faith qualified immunity is that discretionary acts of public officers must not be unduly deterred by the threat of liability. To the extent that the officer has no choice but to do a certain act, such as when a state requires him to perform some ministerial duty, this underlying

rationale is irrelevant.

Burris v. Mahaney, 716 F.Supp. 1051, 1064 (M.D. Tenn. 1989).

The limitation of qualified immunity in §1983 actions to official conduct involving discretionary functions also is necessary to maintain symmetry with other immunities recognized by this Court. Thus, federal officials are not entitled to immunity from state-law tort liability unless their conduct is discretionary in nature. Westfall v. Erwin, 484 U.S. 292 295 (1988)("[A]bsolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity."). Similarly, there is no immunity under the Federal Tort Claims Act unless the defendant was engaged in a discretionary function. See, e.g., Berko-

vitz v. United States, 486 U.S. 531 (1988). It truly would be anomalous for a government official who violates a citizen's constitutional rights to be entitled to greater immunity than one who merely commits a common law or statutory tort.

The instant case is an ideal vehicle for the recognition of the principle that a government official who violates a ministerial duty is entitled to no qualified immunity in an action brought pursuant to 42 U.S.C. §1983. In this case the Respondents knowingly violated an injunction which absolutely prohibited them from "seizing, impounding or confiscating" the video games possessed by Petitioner Russo. Garono v. State, Case No. 85 CV 315 (Mahoning Comm. Pleas 1985), aff'd, 85 CA 44 (Mahoning App. 1985), aff'd, 37 Ohio St.3d

171 (1988).

This injunction was issued only after Respondents stipulated that the seizure of these games was wholly unnecessary for any proper law enforcement purpose. Id. at 172. This injunction was entered to protect the Petitioners' property interest in the possession of the games and their liberty interest in being free of unlawful and unconstitutional seizures of the games, and the seizures and searches of their persons incident thereto. The injunction specified the precise conduct which the Respondents were prohibited from engaging and was absolute in its terms, leaving no room for any exercise of discretion whatsoever by the Respondents. The illegal and unconstitutional conduct prohibited by the Garono injunction was

the precise conduct in which Respondents engaged on April 17, 1987 when they conducted an armed raid, held the Petitioners hostage at gunpoint for two hours and then seized the video games.

The most basic ministerial duty known in American jurisprudence is the obligation of all persons, regardless of status or station in life, to obey an injunction until such time as it is vacated by orderly and proper judicial proceedings. No person, not even a government official, possesses any discretion whatsoever to violate an injunction. See, e.g., Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Shipp, 203 U.S. 563 (1906); State ex. rel. Beil v. Dota, 168 Ohio St. 315, cert. denied, 360 U.S. 912 (1958).

Petitioner respectfully submits that this important issue, whether a government official who violates the most basic ministerial obligation of American jurisprudence should be entitled to qualified immunity, is worthy of authoritative resolution.

II. QUALIFIED IMMUNITY DOES NOT ENTITLE LAW ENFORCEMENT OFFICIALS TO SUMMARY JUDGMENT WHEN THERE IS A MATERIAL ISSUE OF FACT WHETHER THEY ACTUALLY KNEW, OR REASONABLY SHOULD HAVE KNOWN, THAT THEY HAD NO PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH AND SEIZURE

The doctrine of qualified immunity, as reformulated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), holds that no liability will attach unless the government official "violate[d] clearly established

. . . rights of which a reasonable person would have known." Id. at 818. Harlow expressly endorsed the first prong of the pre-existing standard whereby the government official would be held liable if he "knew or reasonably should have known that the action he took . . . violate[d] the constitutional rights of the [plaintiff] . . . ." Id. at 815 (emphasis in original), quoting Wood v. Strickland, 420 U.S. 308, 322 (1975).

At the time Harlow was decided it was recognized that a serious ambiguity remained unresolved: whether a government official who has actual knowledge that he is violating the constitutional rights of the plaintiff is entitled to qualified immunity. Id. at 821 (Brennan, Marshall and Blackmun, J.J., concurring). Later cases

have not resolved this ambiguity. Compare Davis v. Scherer, 468 U.S. 183, 191 (1984) with Malley v. Briggs, 475 U.S. 335, 341 (1986) and Anderson v. Creighton, 483 U.S. 635, 641 (1987) with id. at 638.

The uncertain state of the law of qualified immunity as to whether a government official who has actual knowledge of the illegality of her conduct is immune from liability has created a conflict both between and among the federal circuit courts of appeal. See Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 GA. L. REV. 597, 609 n.49 (1989).

Petitioners respectfully submit that this conflict between and among the circuit courts of appeal presents an issue of public importance which should be resolved

by this Court. Petitioners also respectfully submit that this case clearly illustrates that this issue cannot be avoided by means of an attempted distinction between the government official's "subjective beliefs about the search [which] are irrelevant" and "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed." Anderson v. Creighton, 483 U.S. at 641 (emphasis added).

In the instant case the Sixth Circuit Court of Appeals expressly found that "the only basis for the seizure of the machines and the subsequent arrests is [Respondent] Pohlman's statements that he witnessed and

received payoffs." The Court of Appeals then reversed the District Court's grant of summary judgment to Respondent Pohlman because a reasonable jury could find that these disputed statements were intentional and knowing falsehoods. In contrast, the Court of Appeals partially affirmed the summary judgment for Respondents Massullo, Frost, Martin and Frost on the sole ground that "[t]hey were relying on the assertions of [Respondent Pohlman] that an offense had occurred."

Clearly, the Sixth Circuit's holding that Respondents Massullo, Frost, Martin and Frost were relying on the intentional falsehoods of Respondent Pohlman is a finding of fact masquerading as a rule of law. Under Rule 56 of the Federal Rules of Civil Procedure issues of credibility

and knowledge ordinarily are inappropriate for resolution on summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The Sixth Circuit's decision was compelled by its holding that Anderson v. Creighton, supra, precluded it from considering Respondents' subjective beliefs. This holding, however, also operated to preclude the Sixth Circuit from permitting inquiry into "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] the warrantless search to be lawful, in light of . . . the information [Respondents] possessed." Id. at 641.

In this case the information Respondents Massullo, Frost, Martin and Frost possessed was not merely the assertion of

Respondent Pohlman that he had received a payoff, but also their actual knowledge of Pohlman's lack of credibility. Thus, the issues of subjective belief and objective knowledge were indivisible: Respondents Massullo, Frost, Martin and Frost could not have reasonably believed that which they actually knew to be false.

Petitioners do not rely on a bare allegation that Respondents Massullo, Frost, Martin and Frost actually knew that Respondent Pohlman's assertions regarding a payoff were an intentional and malicious falsehood. Instead, Petitioners presented substantial objective evidence to establish this fact. Respondents' past harassment of owners and possessors of video games had caused an injunction to issue prohibiting each of the Respondents from

"seizing, impounding or confiscating" the games. Garono v. State, supra. In this case it was stipulated that these seizures served no valid law enforcement purpose. Respondent Massullo instigated Respondent Pohlman's investigation of the Stagecoach Restaurant and Lounge by making a accusation, of gambling on the premises, which he knew was false, baseless and refuted by previous investigations by his own department. At all times relevant herein it was a matter of public record that assertions by Respondent Pohlman and his associates that they received payoffs on video games were simply "incredible". State v. Skalada, supra at 1, n.1. Finally, dismissal of the gambling charges filed against Petitioners on the ground that there was no evidence to support them necessarily constituted a judicial finding that Pohlman's

testimony that he received a payoff was so incredible that no jury could believe it.

The holding of the Sixth Circuit that Petitioners are precluded by the doctrine of qualified immunity from presenting to a jury this substantial evidence that Respondents Massullo, Frost, Martin and Frost actually knew they had no probable cause to justify their search and seizure of Petitioners and their property because they knew that the assertions of Respondent Pohlman were intentional falsehoods is in direct conflict with the decisions of other circuit courts of appeal. See, e.g., Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990); Gooden v. Howard County, Md., 917 F.2d 1355 (4th Cir. 1990).

It is respectfully submitted that the conflicts between the federal circuit

courts of appeal on these important issues of public concern should be resolved by this Court.

III. LAW ENFORCEMENT OFFICERS WHO CONDUCT A WARRANTLESS SEARCH AND SEIZURE WITH NO LAWFUL AUTHORITY, UNDER NO EXIGENT CIRCUMSTANCES AND IN DIRECT VIOLATION OF AN INJUNCTION ARE ENTITLED TO NO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983

It is undisputed that Respondents Massullo, Frost, Martin and Frost conducted the search and seizure in this case with the knowledge that they had been absolutely enjoined from "seizing, impounding or confiscating" the very video games which they seized in their armed raid on the Stagecoach Restaurant & Lounge. Petitioners respectfully submit that, even un-

der the most restrictive test of qualified immunity, "the legal norms allegedly violated by the defendant[s] were clearly established at the time of the challenged actions." Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

In 1948 this Court explicitly held that "[t]he validity of a warrantless arrest by a state officer is governed in the first instance by state law." Johnson v. United States, 333 U.S. 10, 15 n.5 (1948). This must necessarily be true because:

> The Fourth Amendment (we begin necessarily with its words) forbids "unreasonable" searches and seizures. The word "unreasonable" implies that the propriety of a search or seizure is to be judged against a background or matrix of societal expectations and assumptions. Some reference must be made to a source outside the Fourth Amendment itself to determine, for example, whether an expectation of privacy is

> reasonable and therefore deserving of constitutional protection. Such sources include "concepts of real or personal property law [and] . . . understandings that are recognized and permitted by society."

Bissonette v. Haig, 800 F.2d 812, 814 (8th Cir. 1986)(en banc), quoting Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).

Perhaps the most clearly established legal principle in American jurisprudence is the rule that an injunction must be obeyed without exception until it is vacated by an appellate court. See, e.g., Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. Shipp, 203 U.S. 563 (1906); State ex. rel. Beil v. Dota, 168 Ohio St. 315, cert. denied, 360 U.S. 912 (1958).

The refusal of the Sixth Circuit to consider the Respondents' knowing viola-

tion of an absolute injunction, issued against the Respondents to prevent precisely the violation of constitutional rights complained of, as part of the "background or matrix of societal expectations and assumptions" against which the reasonableness of a search and seizure must be judged, places its decision in irreconcilable conflict with Bissonette v. Haig, supra.

Petitioners respectfully submit that certiorari should be granted to resolve the conflict between this case and Bissonette. The relationship between state law and the underlying reasonableness of a search and seizure is worthy of this Court's consideration.

The Respondents' warrantless search and seizure of the persons and property of the Petitioners was violative of "clearly

established . . . constitutional rights of which a reasonable person would have known", Harlow v. Fitzgerald, supra at 818, for another, independent, reason.

It was clearly established law long before Respondents' warrantless armed raid on the Stagecoach Restaurant and Lounge, that, absent exigent circumstances or other lawful justification, a warrant is required before law enforcement officials may search a person or seize her property. See, e.g., Steagald v. United States, 451 U.S. 204 (1981).

In this case the Sixth Circuit held that Respondents' two hour armed seige on the Stagecoach Restaurant and Lounge could not be justified, on either statutory or constitutional grounds, as a routine administrative liquor inspection. In addi-

tion, there can be no persuasive argument that there were any exigent circumstances which would excuse Respondents' failure to secure a warrant authorizing their search and seizure of Petitioners' persons and property. More than twelve days elapsed from the conclusion of Respondent Pohlman's undercover investigation, during which he allegedly received the payoff which constituted Respondents' probable cause, and the date of the raid on the Stagecoach Restaurant and Lounge. Respondents certainly had ample opportunity to attempt to secure a warrant during this twelve day period.

This case dramatically illustrates the importance of the fourth amendment's warrant requirement as a bulwark of liberty. The obvious reason why Respondents

did not even attempt to secure a warrant in this case is because they knew that no court in Mahoning County, Ohio would issue one in light of the fact that Respondents had been enjoined absolutely from conducting such a seizure. See State v. Garono, supra.

Petitioners respectfully submit that certiorari is appropriate in this case to address the important issues presented.

IV. PEMBAUER V. CITY OF CINCINNATI, 475 U.S. 469 (1986), ESTABLISHES THAT THE UNCONSTITUTIONAL CONDUCT OF THE FINAL AND ULTIMATE POLICYMAKER ITSELF CONSTITUTES MUNICIPAL POLICY SUFFICIENT TO IMPOSE LIABILITY ON THE GOVERNMENTAL ENTITY UNDER 42 U.S.C. §1983

In this case the United States Court of Appeals for the Sixth Circuit explicit-

ly held that Petitioners had presented sufficient evidence that Respondent Massullo, Acting Chief of Police of Respondent Beaver Township, was the final policymaker of the township. The Sixth Circuit also held that a reasonable jury could find that Respondent Massullo had participated in an unreasonable search and seizure of of Petitioners in violation of the fourth amendment to the United States Constitution. Despite these findings the Sixth Circuit nevertheless affirmed the District Court's summary judgment for Respondent Beaver Township on the ground that Petitioners were required to prove that some additional "'deliberate and discernable [sic] municipal policies or customs' were the moving force behind the constitutional injury." Russo, et. al. v. Massullo, et. al., Case Nos. 90-3240 & 90-3241 (6th Cir.

1991) at 17, quoting Beddingfield v. City of Pulaski, 861 F.2d 968, 971 (6th Cir. 1988).

Petitioners respectfully submit that the Sixth Circuit simply misinterpreted Pembauer v. City of Cincinnati, 475 U.S. 469 (1986). Pembauer clearly held that the unconstitutional act of the final and ultimate policymaker itself constitutes municipal policy sufficient to impose liability on the governmental entity under 42 U.S.C. §1983:

> If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken

> repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983.

Id. at 481 (footnote omitted).

CONCLUSION

For the foregoing reasons Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Stephen W. Gard
Counsel of Record
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-2263

Orville E. Stifel II
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Counsel for Petitioners